In The

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1979

No. 79-237

ALFRED A. GREENBERG,

Appellant,

vs.

STATE OF NEW JERSEY,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of New Jersey on the grounds that the appeal presents no substantial federal question and that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of whether New Jersey Statute 40:55-30 and Cranford Township Zoning Ordinance (1959) Article 4, Section 24-17(b) and Article 20, Section 24-81(a) violate the provisions of Article I Section 8 and Article VI cl. 2 of the United States Constitution when applied to regulate the permissible antenna height of a federally licensed amateur radio station.

New Jersey Statute N.J.S.A. 40:55-30 provides that any municipality may by ordinance limit and restrict to certain districts and regulate therein buildings and structures according to their construction, and the nature and extent of their use, and the uses of land, all within the power of the State (JS5-6).

The statute further provides that the authority conferred shall include the right to regulate the height, number of stories, size of buildings and other structures, and the location and uses and extent of use of buildings (JS6).

In accordance with the provisions of this statute, the Township of Cranford, a municipal corporation of the State of New Jersey, enacted as part of its Zoning Ordinance Article 4, Section 24-17, which limits the height of accessory buildings or structures in a residential zone to 16 feet, and Article 20 Section 24-81 which provides that no building or structure or part thereof shall be erected until a permit shall be granted by the Building Inspector (JS6).

B. The Proceedings Below

On or about June 23, 1975, appellant erected four telephone type poles on his property in the Township of Cranford for use in the construction of two 75 foot radio antenna towers to be

utilized in conjunction with the operation of appellant's amateur radio station.

On December 4, 1976 appellant was found guilty in the Cranford Township Municipal Court and fined $1,000 on each of two counts contained in a complaint filed by the Cranford Township Building Inspector charging excessive tower height and building without a permit.

Appellant appealed to the Union County Court, Law Division, which affirmed the conviction in the quasi-criminal action below but reduced the fine for construction without a permit to $200.

Appellant appealed to the Superior Court, Appellate Division, which affirmed the decision of the Law Division but reduced the fine on the excessive height offense to $200 (JS28-30).

On May 15, 1979 the Supreme Court of New Jersey dismissed appellant's appeal and denied certification (JS31-32).

The state courts below denied appellant's claim that regulation of the apparatus of a federally licensed amateur radio station was preempted under the United States Constitution and by federal law.

ARGUMENT

I.

The appeal presents no substantial federal question.

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926) the Supreme Court upheld the constitutionality of a municipal comprehensive zoning law which regulated among other things the size and height of buildings or structures within the municipality.

A zoning ordinance will not be upheld if it is clearly arbitrary and unreasonable having no substantial relation to the public health, safety, morals or general welfare. *Gorieb v. Fox*, 274 U.S. 603, 71 L. Ed. 1228, 47 S. Ct. 675 (1927).

While not contending that the zoning regulations are unreasonable and arbitrary per se, appellant argues that the municipal regulations are inapplicable because the Federal Communications Commission intended to and has fully preempted the field of regulating federally licensed amateur radio stations (JS14-18).

In New Jersey, as in other jurisdictions, the preemption argument has met with rejection by the state courts.

In *Wright v. Vogt*, 7 N.J. 1, 80 A.2d 108 (1951) the New Jersey Supreme Court held that a radio antenna tower was a permissible accessory use in a residential district provided that the construction complied with the height limitation of the local zoning ordinance.

In *Skinner v. Zoning Board of Adjustment of Cherry Hill Township*, 80 N.J. Super. 380, 193 A.2d 861 (A.D. 1963) the New Jersey Superior Court, Appellate Division, squarely held that the denial of a permit would not constitute an unlawful invasion by a municipality into a federally preempted field of regulation citing the decision of the highest New York Appellate Court in *Presnell v. Leslie*, 3 N.Y. 2d 384, 165 N.Y.S. 2d 488, 114 N.E. 2d 381 (Ct. App. 1957).

In *Kroeger v. Stahl*, 148 F. Supp. 403 (D.C. 1957), *aff'd*, 248 F.2d 121 (3rd Cir. U.S.C.A. 1957) the U.S. District Court for the District of New Jersey held that the mere fact that a radio station was engaged in interstate commerce and the property in question was used for that purpose did not affect the validity of the zoning ordinance. The court's decision was affirmed by the U.S. Court of Appeals for the Third Circuit.

Thus it appears that both New Jersey and the federal courts have determined that there exists no federal preemption in this field and that the municipality may enact and enforce reasonable regulations relating to the height of radio antenna towers.

Nevertheless, appellant argues that all of the aforementioned courts were in error in their respective determinations and that preemption has occurred.

However, appellant cites in the Jurisdictional Statement no specific federal statute or regulation which would tend to indicate that the regulation of the antenna height of amateur radio stations has been federally preempted.

Rather, appellant has merely demonstrated that Congress has delegated general regulatory powers to the Federal Communications Commission under 47 U.S.C. Section 303.

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L. Ed. 2d 852, 80 S. Ct. 813 (1960), this Court stated that in determining whether state regulation has been preempted by federal action, the intent to supersede is not to be inferred by the mere fact that Congress has seen fit to circumscribe its regulation and occupy a limited field. Such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963) the Supreme Court held that the jurisdiction of the Federal Communications Commission to regulate radio advertising did not preclude the State of New Mexico from proscribing price advertising of eyeglasses by radio.

The Court concluded that it would be inappropriate to give the federal statute preemptive effect in view of the absence of a clear congressional mandate. *Head v. Board of Examiners*, *supra*, 374 U.S. 443-445.

Appellee respectfully asserts that the Cranford Township Zoning Ordinance is a regulation of general application designed to promote the health and welfare of the community similar to the New Mexico regulation upheld by the Supreme Court in *Head v. Board of Examiners.*

There appears to be no conflict between the act of Congress and the local regulation, and under the principles of preemption discussed previously the Court should dismiss appellant's appeal, or, in the alternative, affirm the judgment below.

II.

The New Jersey Court Rule precluding jury trials in cases of this type is not invalid.

New Jersey Court Rule 3:23-8(a) provides that an appeal from a judgment of a municipal court shall be heard *de novo* on the record unless it shall appear that the rights of a defendant were prejudiced below in which event a plenary trial *de novo* without a jury shall be conducted.

Appellant in this cause appealed from such a judgment and demanded a jury trial which was denied by the Union County Court, Law Division. The denial of a jury trial was upheld by the Superior Court, Appellate Division, and the New Jersey Supreme Court denied certification and dismissed appellant's appeal (JS28-32).

Appellant stands convicted of failing to obtain a building permit to erect his radio antenna tower and of constructing the tower in excess of the height limitation established in the Cranford Township Zoning Ordinance.

Section 24-96(a) of the ordinance establishes the penalty for violation of the ordinance to be a fine of not more than $200 or imprisonment for not more than 90 days or both.

The statutory limit on penalties for violation of local ordinances is established in New Jersey by N.J.S.A. 40:49-5 to be a $500 fine or 90 days imprisonment or both.

In support of his argument on the jury trial issue, appellant cites the case of *Ludwig v. Massachusetts,* 427 U.S. 618, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976). However, in that decision the Supreme Court held that the Massachusetts "two-tier" system did not violate a defendant's right to trial by jury.

In *Ludwig v. Massachusetts* this Court referred to its decision in *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) which held that the right to a jury trial exists in a "serious" criminal case rather than in a case involving a "petty offense".

The Court held in *Duncan v. Louisiana* at 391 U.S. 160 that crimes carrying penalties up to 6 months do not require a jury trial if they otherwise qualify as petty offenses.

The Supreme Court stated that in the federal system petty offenses are defined as those punishable by no more than 6 months in prison and a $500 fine. In addition, in 49 of the 50 states, crimes subject to trial without a jury are punishable by no more than one year in jail. *Duncan v. Louisiana, supra,* 391 U.S. 161.

Under these guidelines, it would appear that no right to a jury trial existed in the case at bar so that the result below need not be disturbed on this ground.

III.

Affirmance without opinion under New Jersey Court Rule 2:11-3(e)(2) does not violate appellant's right to due process.

In the Jurisdictional Statement appellant argues that the New Jersey Court Rule 2:11-3(e)(2), permitting affirmance without opinion where some or all of the issues raised on appeal are clearly without merit, deprives appellant of his due process rights since it does not provide for the orderly judicial review of constitutional questions arising in criminal proceedings (JS21-26).

It must be noted that Judge Callahan, sitting in the Union County Court, Law Division, wrote a 9 page opinion letter in which he made specific findings on the issues raised by appellant.

This opinion letter, together with the transcript of the proceedings below and the briefs of counsel were all considered by the Superior Court, Appellate Division, in accordance with New Jersey Court Rule 2:5-4(a).

Oral argument was heard by the Appellate Division on March 6, 1979 and the opinion contained at pages 28-30 of the Jurisdictional Statement was rendered on March 16, 1979.

The Superior Court, Appellate Division, gave full consideration to the appeal but found it without merit save for the two areas discussed in the opinion.

In no way can this appellate procedure be characterized as depriving appellant of his right to due process.

Similarly, the New Jersey Supreme Court dismissed the appeal taken by appellant and the petition for certification filed after its review of these applications (JS31-32).

There is no compulsion on the part of the New Jersey Supreme Court to express in detail its reasons for denying certification or dismissing an appeal it considers to be without merit.

The United States Supreme Court itself has adopted such procedures as reflected in Supreme Court Rule 16 and Rule 25. There appears to be no reason to disturb the result below based upon the reasons appellant alleges in Point C of the Jurisdictional Statement.

CONCLUSION

WHEREFORE, appellee respectfully submits that the appeal at bar presents no substantial federal question and that the questions on which the decision of the cause depends are so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

s/ Donald R. Creighton
Attorney for Appellee

APPENDIX

OPINION LETTER DATED APRIL 26, 1977

UNION COUNTY DISTRICT COURT

JOHN J. CALLAHAN
Judge

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Elizabeth, N.J. 07207

Elson P. Kendall, Esq.
310 Madison Hill Road
Clark, NJ 07066

Ralph P. Taylor, Esq.
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P.O. Box 247
Cranford, NJ 07016

Gentlemen:

Re: State v. Alfred A. Greenberg
Municipal Appeal #2400

The facts from the record confirm that defendant, Alfred A. Greenberg, has resided in a one family dwelling known as 313 Bloomingdale Avenue, Cranford, since January 1954. He owns this property which is located partially in Cranford Township and partially in adjacent Kenilworth Borough. The record reflects the Cranford portion is in a residential zone, although there is no evidence as to the zoning of that portion in Kenilworth. All of the physical evidence, however, creates the impression that Kenilworth's portion also is residentially zoned. The gentleman has been active in amateur radio over the entire period of his residency as far back as 1938.

On or about June 23, 1975, the defendant erected on his property four telephone type poles. Two poles were erected in

his side yard and two in his rear yard. Each pole was 65 feet in length, with 10 feet below ground level and 55 feet above ground level. Defendant described his interest to construct two antenna towers on this property. The total height of each completed tower would have been approximately 75 feet. Defendant started to construct the towers, without attempting to file his plans and secure a building permit from the Township of Cranford.

The building inspector shortly thereafter informed the defendant that his towers were in violation of the Township's zoning ordinance and recommended that the defendant apply to its Board of Adjustment for a variance. Greenberg then notified the building inspector that he would neither remove the poles nor apply for a variance. Robert Fuller, Building Inspector of the Township of Cranford, then filed a complaint in the Cranford Municipal Court on August 27, 1975.

On September 24, 1975, a request for an indefinite adjournment was made to the Court. Elson P. Kendall, Esq., defendant's counsel, obtained agreement to have the matter postponed to enable defendant to apply for relief from the Board of Adjustment. The matter was adjourned by the Court, but reactivated and subsequent trial was had on December 4, 1976, in the Cranford Municipal Court when the application to the Zoning Board was never pursued.

During the trial, defendant's own testimony showed that he was an ardent amateur ham radio operator, that this was his hobby; that with his existing antenna he could utilize this total equipment to talk to people all over the world; that the type of antenna defendant desired to construct would be unique and, in defendant's own words, that after he finished "many would follow." Apparently, Greenberg has not been able to complete the projected tower plan to utilize those towers.

The defendant was found guilty of two violations of the Township of Cranford on December 6, 1976. The Court below

found the defendant had installed four poles that were to be used as radio antenna towers without obtaining a building permit contrary to Article 20, Section 24-81(a) of the Cranford Zoning Ordinance; and that defendant had erected an antenna tower over 16 feet in height in violation of Article 3, Section 24-17(b) of the Cranford Zoning Ordinance.

Defendant now appeals from the findings of the Cranford Municipal Court.

Sequentially, the Court heard argument on the appeal on March 9th, determined that the lower Court improperly quashed the service of defense subpoenas and allowed Greenberg to resubpoena those witnesses, and records, who might give evidence on the residential selectivity of enforcement proofs. The right to compulsory process, this court held, should not be denied in view of the technical failure by an agent making service to prepare such process erroneously and fail to tender the proper witness subpoena fee.

The right of a criminal defendant to compulsory process, as guaranteed by N.J.S.A. Const. Art. 1, 10, 15, is "fundamental to our legal system," *People v. Watson,* 221 N.E. 2d 645, 648 (Sup. Ct. of Ill. 1968), and constitutes "a basic constitutional safeguard; consequently, any rule which abridges this right must be examined with scrutiny." *Ezell v. State,* 413 *S.W.*2d 678, 680-681 (Sup. Ct. of Tenn. 1967). *See also, United States v. Nixon,* 418 *U.S.* 683, 711-713 (1974); *State v. Jones,* 57 *N.J. Super.* 260 (App. Div. 1959). Thus, defendant's claim of an abridgement of this right must be carefully scrutinized. Proceedings to enforce zoning ordinances are "at least quasi-criminal in nature," *State v. Seich,* 98 *N.J. Super.* 466, 471 (Cty. Ct. 1967), and should, therefore, be viewed "as criminal in nature . . ." *State v. Loux,* 76 *N.J. Super.* 409, 414 (App. Div. 1962). *See also, Town of Kearny v. Modern Transportation Co.,* 116 *N.J. Super.* 526, 529 (App. Div. 1971).

In view of the reasonableness of the error involved, such a fundamental right should not be voided on such a technical application of the law. Counsel volunteered to comply immediately below in tender of all fees. Whether evidence of such discriminatory enforcement could be spelled out, however, was presented to the Court in an almost full day hearing on March 24th. Mere selectivity not "deliberately based upon an unjustified standard," is an insufficient basis upon which to prove an equal protection violation. *State v. Rowe*, 140 *N.J. Super.* 5, 9 (App. Div. 1976). *See also, State v. Jennings*, 126 *N.J. Super.* 70, 79-80 (App. Div.) *certif. denied*, 60 *N.J.* 512 (1972); *United States v. Steele*, 461 *F*2d 1148 (9th Cir. 1972). This principle which the court understands defendant to bottom his attack of the prosecution upon is more fully set forth in *Oyler v. Boles*, 368 *U.S.* 448 (1962), where the Court at page 453 stated: "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case [a habitual offender prosecution] might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Accord: State v. Boncelet*, 107 *N.J. Super.* 444, 453 (App. Div. 1969); *State v. Savoie*, 128 *N.J. Super.* 329, 337 (App. Div. 1974), *rev'd on other ground*, 67 N.J. 439 (1975); *State v. Saunders*, 130 *N.J. Super.* 234, 241 (Law Div. 1974).

In *Steele, supra*, defendant was charged with refusing to answer census questions, in violation of 13 U.S.C.A. §221(a). Defendant claimed, and his claim was supported by the evidence, that of a large number of violators, he and three others alone were chosen for prosecution because of their active participation in "a census resistance movement . . ." *Id* at 1150. The Court found this evidence sufficient to prove "that the authorities purposefully discriminated against those who chose to exercise their First Amendment rights," and thus "entitled [defendant] to an acquittal." *Id* at 1151. The Court went on to

hold, at page 1152: "The government offered no explanation for its selection of defendants, other than prosecutorial discretion. That answer simply will not suffice in the circumstances of this case. Since *Steel* presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground. Mere random selection would suffice . . . Since no valid basis for the selection of defendants was ever presented, the only plausable explanation on this record is the one urged by [defendant]."

Two utilities, New Jersey Bell Telephone Company and Public Service Electric and Gas Company, were released from the effect of the subpoenas returnable on March 24th, upon filing subsequently of affidavits with the Court. These affidavits confirm the Telephone Company has exclusive control of some one hundred forty-three (143) poles extending twenty-nine feet, six inches (29'6") from ground to pole top and some three thousand poles jointly shared with the electric utility. The latter range up to a height of forty-eight feet (48') (from ground to pole top. This height is reputed to be the exception or "occasional" pole, as opposed to the remaining majority thirty-four foot (34') or thirty-eight foot, six inch (38'6") poles from ground to top of pole. The Electric Company also maintains three (3) electric transmission towers within the township ranging in height to one hundred fifty-eight feet (158'). Although there is currently litigation being carried on in the municipality against this type of power structure, counsel for the municipality validly argues that municipal jurisdiction over these structural items is precluded by the terms of N.J.S. 40:55D-19.

A number of subpoenaed business persons in the community and a representative of a commercial business dealing in the actual erection of such radio structures for business therein also testified. To review their individual testimony would add nothing to this record in spelling out anything unusual, let alone providing any clue to official

complicity to improperly approve such radio tower structures in Cranford. There were two exceptions where towers were apparently erected without official sanction in the case of a Fuel Oil Supply Company and an individual business entrepreneur. No evidence, however, shows the town was aware of such violations.

Certain subpoenaed employees of the municipality could not appear due to illness or departure from employment. Those persons (Stone and Seymour) were acknowledged to be unavailable and not necessary to be heard. The testimony of no witness evidenced any conspiracy or independent act by any public official of the municipality to prosecute defendant for any reason other than the ordinance violations alleged. When subpoenaed by the defendant for the municipal court hearing, the police chief, one Haney, plausibly and credibly testified, I find, that he told the gentleman as a co-amateur radio enthusiast, "This is costing you money. I think you ought to go for a variance." Haney further intimated that the zoning officer considered Greenberg a gentleman and recourse to proper municipal variance procedures should be attempted by him. Nothing more can be spelled by this exchange, and certainly nothing from service of the within violations by a municipal police officer, rather than some other town employee.

Defendant has raised an equal protection clause argument. Specifically, there exists here a purposeful discrimination in the enforcement of these zoning ordinances. Has this enactment been used to discriminatorily harass defendant? There is a basic requirement to establishing non-prosecution of other violators. Here it has not been met. The Court cannot infer an intentional prosecutorial selectivity in the choice of this defendant, as no credible motive to supply such an inferential basis has been evidenced in this expanded record. There has been no proof satisfying to this Court that Cranford through its officials selectively prosecuted Mr. Greenberg. The friendly advices of the

municipal police chief, Haney, could only at best have been misunderstood or at worst wrenched out of context. The statistical evidence compiled is meager. Public utility poles of electrical and telephone companies as indicated are controlled by statute beyond the municipal zoning reach. N.J.S.A. 40:55D-19. Tower erection without building permits in non-residential areas on commercial structures or appurtenant thereto, erected by Fuel Oil Supply Company of 600 South Avenue, Cranford, New Jersey, and a refuse disposal company of one John Errico, do not evidence proof of knowledge or complicity by the township, in allowing radio towers to be erected on their property.

Zoning ordinances are to be liberally construed in favor of municipalities. Article IV, Section VII, Paragraph II, of the New Jersey Constitution. Leading zoning cases implement this principle. *Thornton v. Village of Ridgewood,* 17 *N.J.* 499 (1955); *Fischer v. Bedminster Township,* 21 *N.J. Super.* 81 (Law Div. 1952) aff'd 11 *N.J.* 194 (1952); *United Advertising Corp. v. Borough of Raritan,* 11 *N.J.* 144 (1952). If, as the defendant argues, the pertinent provisions of the Cranford Zoning Ordinance must be struck, he runs full into such authority.

Defendant contends that the zoning ordinance and building code as applied herein to home entertainment devices is an invalid use of Cranford's police power, in that regulation of such devices has been pre-empted by the Federal Communications Act of 1934, as amended, 47 U.S.C.A. §151 *et seq.* This same issue was raised and decided in a manner adverse to defendant in *Skinner v. Zoning Bd. of Adjust., Cherry Hill Tp.,* 80 *N.J. Super.* 380, 391-392 (App. Div. 1963). Therein the Court said, at p. 392: "Despite the federal regulation of radio communications, there arises problems dealing with amateur radio, often carried on in the amateur's home, which require for their proper solution through consideration of the particular area and surroundings. Regulation of these matters is properly left to local regulation without impairment of the national interest in

the matter. A zoning regulation is such a matter of local concern." Additionally, *Skinner* and *Wright v. Vogt*, 7 *N.J.* 1 (1951) make clear that no other factors prohibit a municipality from placing height limitations upon amateur radio antennas. Such antennas are classified as "an 'accessory use' within a residential zone . . ." *Skinner, supra*, at 383. Section 24-17(b) of the Cranford Zoning Ordinance provides: "In the residential zones no accessory building or structure which is accessory to a residential use shall exceed 16 feet in height." In view of *Wright* and *Skinner*, this appears a proper exercise of Cranford's police power, as applied to defendant herein.

Defendant further contends that the Court below improperly permitted an amendment of the charge from §114.0 of the Standard Building Code of New Jersey to §24-81(a) of the Cranford Zoning Ordinance. Defendant argues that this amendment lowered the State's burden of proof, in that §114.0 requires a showing of changed conditions, while §24-81(a) requires a showing of only changed or altered conditions. A reading of the sections involved defeats this argument. §114.0 provides: "It shall be unlawful to construct, enlarge, alter, remove or demolish or change the occupancy from one use group to another . . . without first filing an application with the building official in writing and obtaining the required permit therefore . . ." §24-81(a) provides: "No building or structure or part thereof shall be erected, raised, moved, extended, enlarged, altered or demolished until a permit has been granted . . ." The substance of these charges, and hence the State's burden of proof, is identical, and thus the amendment was proper under R.7:10-2. *See, State v. Blackman*, 125 *N.J. Super.* 124, 129-130 (App. Div. 1973).

Defendant inferentially argued a failure of the municipality to cooperate in providing records on file of the conduct of the zoning officer's activities within the municipality. The production of such documentary evidence, this Court is satisfied,

is one question but certainly on this record including the testimony presented on March 24th, it finds that such information by way of records is and was available to defendant throughout the litigation. Same should have been presented by direct testimony below by defendant's own witnesses if desired. N.J.S. 47:1(a)-2 requires such records be "keep on file by any Board . . . or of any political sub-division thereof." Further, this statute appears to present the burden of producing such evidence upon defendant in that "every citizen . . . during the regular business hours maintained by the custodian of any such records, . . . shall have the right to inspect such records." Finally, the citizen may copy or arrange to purchase copies of such records.

It is, of course, axiomatic that "an essential element necessary to the invocation of jurisdiction in criminal cases is that the crime be committed in the state in which the case is tried." *State v. McDowney*, 49 *N.J.* 471, 474 (1967). While the legislature has imbued the municipal court with the power to hear cases relating to "any premises or property situated or located partly within and partly without such municipality . . ." N.J.S.A. 2A:8-20, this does not confer power upon these Courts to enforce the ordinances of one municipality upon property situated within another. In fact, it is doubtful that, without specific statutory authority, a municipality has any legislative or police powers beyond its borders. *State v. Larsons*, 195 *N.W.*2d 180, 183 (Sup. Ct. of Minn. 1972); *Smeltzer v. Messer*, 225 *S.W.*2d 96, 97 (Ct. of App. of Ky. 1949). *See also, Newark v. Public Service Co-Ordinated Transport*, 9 *N.J. Misc.* 720, 725 (Sup. Ct. 1931), aff'd 109 *N.J.L.* 270 (E.&A. 1932), recognizing the power of a municipality to provide police protection "within its boundries." This principle, as applied to zoning ordinances, limits their enforcement to property located within the municipality. This appears to be the rule in every jurisdiction which has passed upon the question. Thus, in *Robinson v. City of Montgomery*, 233 *So.*2d 69, 70 (Sup. Ct. of Ala. 1970) the Court acknowledged that "In the absence of any enabling

legislation expressly providing otherwise, zoning enactments of a municipality are limited to its territorial boundries and are invalid to the extend that they seek to impose zoning regulation and restrictions on land outside city limits." *See also, Roosevelt v. City of Englewood,* 492 *P*2d 65, 70 (Sup. Ct. of Colo. 1971); *Lepenas v. Zoning Bd. of App. of Brockton,* 226 *N.E.*2d 361, 363 (Sup. Jud. Ct. of Mass. 1967); *State v. Larson, supra; Shles v. Town Council of Town of West Hartford,* 268 *A*2d 395, 404 (Sup. Ct. of Conn. 1970); *State v. Owens,* 88 *S.E.*2d 832, 834 (Sup. Ct. of N.C. 1955); *Sanders v. Snyder,* 178 *N.E.*2d 174 (Ct. of App. of Ohio 1960); *Smeltzer v. Messer, supra.* While the Cranford Municipal Court has jurisdiction to hear the matter as to the poles located within Kenilworth, N.J.S.A. 2A:8-20, it could not do so based upon the Cranford Zoning Ordinances. This is especially significant in light of defendant's uncontradicted contention that the Kenilworth Zoning Ordinance did not prohibit at least two of the poles at the time of their erection or emplacement. This Court is consequently left with the task of determining upon its findings of fact and conclusions of law, the sufficiency of penalties for the two poles at least within the Township of Cranford under its ordinances.

Ordinance §24-26 (presently 24-96) relating to penalties provides for a maximum penalty of $200.00 and/or 90 days in jail. It continues: "A separate offense shall be deemed committed on each day during which a violation occurs or continues." N.J.S.A. 40:49-5 was amended in 1968, permitting fines up to $500.00. Cranford as late as January 25, 1977, has opted to authorize less than this authorized penalty amount. Defendant contends that this "fractionalization" is improper, although no authority is cited in support of this contention. The Court has found none. It appears, however, that only one of the two offenses of which defendant was convicted below can reasonably be interpreted as being of a continuing nature. §24-81(a), failure to obtain a building permit, was violated by building without a permit. Such an ordinance can only be violated once. The fine

on that violation is fixed at $200.00. §24-17(b), accessory structures over 16 feet, is the type of ordinance which can be considered as violated every day the structure remains, and thus a review of this violation in terms of penalty imposed appears reasonable upon that record. Defendant apparently has made a thoughtful, calculated challenge of the municipality's zoning power. The poles were emplaced in July, 1975, and prosecution delayed while efforts at suggesting other process to resolve the residents actions were offered. Defendant chose not to take this avenue. The penalty does not appear punitive in nature but designed to require a choice by Greenberg. That choice having been elected, provision for further appeal is available.

The Court is not aware of any power under review of these convictions to mandate as required by the township that defendant remove the structures forthwith. Enforcement by the governing body appears to require steps be taken under N.J.S. 40:55D-18. No authority has been provided. Should defendant elect to further appeal, he has such right. Should he not, further action presumably can be considered by the municipality in the light of this opinion.

The Court having considered as indicated all the testimony and any arguments presented in writing filed with the Court on or before April 15th, an Order will be signed entering Judgment of Conviction in the amount of $1,000.00 and $200.00 respectively on each section violated. There shall also be affixed costs of $10.00 to be remitted to the Union County Clerk within ten days hereof.

Counsel should arrange to pick up all exhibits in view of the extent and nature of same upon arrangement with my clerk.

Opinion Letter

Dated: April 26, 1977

s/ John J. Callahan
JOHN J. CALLAHAN, J.D.C.
T/A

cc Stanley J. Kaczorowski, Esq.
Borough Prosecutor for Kenilworth

RELEVANT CITATIONS

New Jersery Court Rule 2:5-4(a)

"Record on Appeal

(a) Contents of Record. The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matter made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court."

Cranford Township Zoning Ordinance:

"Article 22. Violations.

24-96. Penalty.

(a) Any owner or agent, and any person or corporation who shall violate any of the provisions of this chapter or fail to comply therewith or with any of the requirements thereof or who shall erect, structurally alter, enlarge, rebuild, or move any building or buildings or any structure, or who shall put into use any lot or land in violation of any detailed statement or plan submitted hereunder, or who shall refuse reasonable opportunity to inspect any premises, shall be liable to a fine of not more than $200.00 or to imprisonment for not more than 90 days, or to both such fine and imprisonment. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues."

Relevant Citations

New Jersey Statute Title 40:49-5

"Penalties for violating ordinances; maximum

The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, either by imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days, or by a fine not exceeding *$500.00* or both. The court before which any person is convicted of violating any ordinance of a municipality, shall have power to impose any fine or term of imprisonment not exceeding the maximum fixed in such ordinance."